IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

In Re: Staples, Inc. Wage and Hour Employment Practices Litigation	Civil Action No. 08-5746 (KSH) (PS) MDL No. 2025

PLAINTIFFS' SECOND SUPPLEMENTAL MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR AN AWARD OF EXPENSES AND ATTORNEYS' FEES

Seth Lesser
Fran Rudich
KLAFTER OLSEN & LESSER LLP
Two International Drive, Suite 350
Rye Brook, NY 10573

Michael A. Galpern
Andrew P. Bell
Janet Walsh
LOCKS LAW FIRM, LLC
457 Haddonfield Rd. Suite 500
Cherry Hill, NJ 08002

Attorneys for the Plaintiffs and the Class

Additional Counsel Listed on
Signature Page

TABLE OF CONTENTS

DISCUSSION 2

I. CLASS COUNSEL'S NON-*STILLMAN* TIME AND LODESTAR. 2

II. CLASS COUNSEL IS REQUESTING A NEW FEE AWARD. 4

III. THE COURT MAY AWARD A NEW FEE REPRESENTING A PERCENTAGE OF THE SETTLEMENT FUND NOTWITHSTANDING THE *STILLMAN* JUDGMENT. .. 4

CONCLUSION 8

TABLE OF AUTHORITIES

Cases:

Albanese v. Bergen County, 991 F. Supp. 410 (D.N.J. 1997).. 6

Boeing Co. v. Van Gemert, 444 U.S. 472 (1980).. 5

EEOC v. Westinghouse Elec. Corp., 869 F.2d 696 (3d Cir. 1989).. 6

Major League Baseball Properties, Inc. v. Pacific Trading Cards, Inc., 150 F.3d 149 (2d Cir. 1998)... 7

Moore v. United States, 63 Fed. Cl. 781 (2005) 5, 6, 7

Staton v. Boeing Co., 327 F.3d 938 (9th Cir. 2003) 6

Stillman v. Staples, Inc., 2009 U.S. Dist. LEXIS 42247 (D.N.J. May 11, 2009) 6

United Ins. Co. v. St. Paul Fire & Marine Ins. Co., 2001 U.S. Dist LEXIS 24565 (D. Kan. Apr. 24, 2001) 7

Statutes:

29 U.S.C. 216(b) 6

Rules:

Federal Rule of Appellate Procedure 42(b) 7

By Order dated October 26, 2010, the Court adopted the Report and Recommendation filed by Magistrate Judge Patty Shwartz without modification. Order Adopting Report and Recommendation (Oct. 26, 2010) [Docket 131]. Pursuant to Paragraphs (6) though (9) of the Report and Recommendation, Class Counsel made a supplemental filing in support of their request for an award of attorneys' fees and expenses and a declaration with exhibits.[1] As directed by the Report and Recommendation, the supplemental filing included the following:

- As directed by Paragraph 7: A chart presenting FLSA cases that resulted in settlements and used the percentage of recovery method to calculate fees. *See* "Common Fund Settlement Attorneys' Fee Survey," attached as Exhibit A to the Lesser Supp. Decl.); *see also* Supplemental Memorandum at 7-13 (discussing the precedent).
- As directed by Paragraph 8: Certifications setting forth the hours of non-*Stillman* work and applying the hourly rates set by Magistrate Judge Patty Shwartz in her Opinion, dated September 24, 2009, in *Stillman* (the "Fee Award Order") (Stillman Dkt. # 739), attached as Exhibit N to the Lesser October 22 Declaration. *See* Lesser Supp. Decl. at ¶¶ 16 & 17 (presentment of non-*Stillman* hours at *Stillman* rates) & Exhibits B-L (plaintiffs' counsel's supplemental certifications).
- As directed by Paragraph 9: Certifications setting forth costs incurred for non-*Stillman* work applying standards established by the Fee Award Order. *See* Lesser Supp. Decl. at ¶ 21 (presentment of non-*Stillman* expenses and limited to

[1] *See* Memorandum of Law in Further Support of Plaintiffs' Motion for an Award of Expenses and Attorneys' Fees, and in response to the Magistrate Judge's September 17, 2010 Report and Recommendation [Docket No.130] ("Supplemental Memorandum"); Supplemental Declaration of Seth R. Lesser in Further Support of Class Counsel's Motion for An Award of Attorneys' Fees And Expenses [Docket No. 130(1)] ("Lesser Supp. Decl."). Paragraph 6 of the Report & Recommendation is a finding and did not direct Class Counsel to make any submissions.

types of expenses Court found taxable) & Exhibits B-L (plaintiffs' counsel's supplemental declarations).

The Court nonetheless stated that the Supplemental Memorandum omitted certain information required by Paragraphs (6) though (9).[2] The Court therefore directed Class Counsel to submit a filing that (1) specifies the fees incurred after the *Stillman* judgment was entered and (2) indicates whether Class Counsel is requesting the Court "to ignore the judgment in *Stillman* as to legal fees and make a new fee award" and, if so, "provide[s] legal authority for overlooking/ignoring/vacating an existing judgment."

DISCUSSION

I. CLASS COUNSEL'S NON-*STILLMAN* TIME AND LODESTAR.

For lodestar cross-check purposes and pursuant to the Court's direction, Class Counsel's supplemental certifications, Exhibits B-K to the Lesser Supp. Decl., set forth plaintiffs' counsel's hours of work, other than that which is the subject of the fee and expense judgment entered in *Stillman* (the "*Stillman* Judgment"), and applies the hourly rates set in the *Stillman* Fee Award Order to the hours expended.[3] As the chart below reflects, Class Counsel worked a total of 5,983.53 hours on matters other than the work which is the subject of the *Stillman* Judgment. Applying the rates set forth in the *Stillman* Fee Award Order results in a lodestar of $2,022,057.83 for this non-*Stillman* work only, broken down as follows:

[2] Class Counsel apologize for inadvertently failing to make clear that the matters addressed in the bullet points above were all included in the declarations that were submitted.

[3] The prior submission was not limited to fees after the *Stillman* Judgment, but also included non-*Stillman* time incurred prior to the *Stillman* Judgment. Prior to entry of the *Stillman* judgment, Class Counsel also had expended time in a number of the other actions which are part of the Settlement**.** These actions were litigated separately from Stillman and were at varying stages of proceedings, from initial filing to briefing on class certification, prior to transfer to this Court.

Firm	Hours	Lodestar
Klafter Olsen & Lesser LLP (Lesser Supp. Decl. Ex. B ¶ 5)	1,053.2	$431,789.50
Locks Law Firm (Lesser Supp. Decl. Ex. C ¶ 5)	1,260.6	$511,015.00
Mason LLP (Lesser Supp. Decl. Ex. D ¶ 6)	736.28	$214,439.25
Barroway Topaz Kessler Meltzer & Check, LLP (Lesser Supp. Decl. Ex. E ¶¶ 11, 22)	2,311.8	$671,569.33
Lite DePalma Greenberg, LLC (Lesser Supp. Decl. Ex. F ¶ 5)	329.4	$108,752.50
The Consumer Advocacy Center, P.C. (Lesser Supp. Decl. Ex. G ¶ 5)	26.3	$7,761.00
Fugazy & Rooney LLP (Lesser Supp. Decl. Ex. H ¶ 5)	163.2	$53,602.00
Barkan Neff Handelman Meizlish, LLP (Lesser Supp. Decl. Ex. I ¶ 5)	27.45	$6,023.75
Kelly Law Office (Lesser Supp. Decl. Ex. J ¶ 5)	25.8	$7,095.00
Law Office of Michael J. San Souci (Lesser Supp. Decl. Ex. K ¶ 4)	36.4	$10,010.50
TOTALS	**5,970.43**	**$2,022,057.83**

Using counsel's ordinary and customary billing rates, and not those set by the *Stillman* Fee Award Order, yields a lodestar of $2,804,956.55, broken down as follows:[4]

Firm	Hours	Lodestar
Klafter Olsen & Lesser LLP	1,053.2	$623,212.75
Locks Law Firm	1,260.6	$567,474.00
Mason LLP	736.28	$363,271.50
Barroway Topaz Kessler Meltzer & Check, LLP	2,311.8	$981,696.55
Lite DePalma Greenberg, LLC	329.4	$184,612.50
The Consumer Advocacy Center, P.C.	26.3	$8,223.00
Fugazy & Rooney LLP	163.2	$53,602.00
Barkan Neff Handelman Meizlish, LLP	27.45	$6,023.75
Kelly Law Office	25.8	$6,830.00
Law Office of Michael J. San Souci	36.4	$10,010.50
TOTALS	**5,970.43**	**$2,804,956.55**

[4] This is calculated by applying the hourly rates set forth in Exhibits B-K to the August 23, 2010 Lesser Declaration to the hours set forth in Exhibits B to L of the Lesser Supplemental Decl. A few firms had adjustments between the two sets of declarations relating to inquiries from clients or inadvertently missed (or miscalculated) time. If the Court requests, Class Counsel can provide another set of declarations setting the calculations (or any aspect of the time expended) in a line-by-line fashion but we believe that such an exercise is unnecessary because the data is already all presented. We believe the proper hourly rates are those set forth in the August 23, 2010 filing, a point underscored by the declarations that were filed at the time of the *Stillman* fee application, and in the appeal of the *Stillman* Fee Judgment.

II. CLASS COUNSEL IS REQUESTING A NEW FEE AWARD.

Class Counsel is requesting the Court to make a new fee award. Class Counsel has asked the Court to award the amount of $11,500,000, which is 27.5% of the Settlement Fund in lieu of the *Stillman* Judgment.

III. THE COURT MAY AWARD A NEW FEE REPRESENTING A PERCENTAGE OF THE SETTLEMENT FUND NOTWITHSTANDING THE *STILLMAN* JUDGMENT.

Class Counsel submit that the existence of the *Stillman* Judgment does not preclude the Court from making a new fee and expense award from the Settlement Fund created by the Settlement Agreement, based on all of the time spent on *Stillman* and non-*Stillman* actions. The Settlement constitutes a settlement not only of the claims pending in the cases that comprised the MDL, and a state case in Massachusetts, but also the *Stillman* Judgment, which includes the Court's award in favor of the 342 *Stillman* plaintiffs and the Court's award in favor of *Stillman* plaintiffs' counsel for their attorneys fees and expenses. *See* Settlement Agreement (Docket 111-3 at 1-2, 10-11 (¶6(a), ¶7(b)), 24-25 (¶ 15).

First, and most significantly, the *Stillman* Judgment is not *res judicata* in that it is not a final judgment. It is an unsatisfied, appealed, non-final judgment. Class Counsel filed a timely appeal of the *Stillman* Judgment on the grounds that the Court improperly excluded certain hours and expenses, and improperly capped certain hourly rates under the standards governing statutory fee and expense awards.[5] That appeal will remain pending until such time as this Court enters a judgment in this case approving the Settlement and awarding fees and expense out of the Settlement Fund and that judgment becomes final and not subject to further appeal, at which point, counsels' appeal of the *Stillman* Judgment will be dismissed and the judgment will be

[5] Specifically, plaintiffs sought an award of approximately $3,343,409.60 million in attorneys' fees, but were only awarded $2,150,449.80 million. Defendants also timely appealed from the award to the *Stillman* plaintiffs.

deemed satisfied.[6] *See* Settlement Agreement, ¶ 7 (b) (the fees and costs awarded by the Court "shall include and constitute satisfaction of the entire amount of attorneys' fees and costs awarded by the Court in the Stillman case"). If necessary, Class Counsel will file a satisfaction of judgment in *Stillman* stating that the *Stillman* Judgment has been satisfied by this Court's award of fees out of the common fund established by the Settlement.

Second, while our research failed to reveal any case where a court was asked to render a new fee award from a common fund obtained for a class in lieu of a prior statutory fee award rendered in connection with representing a subset of the class, we found one principled decision in which the court specifically awarded a percentage of a common fund as an attorney fee even though the plaintiffs' counsel had previously secured a right to a statutory fee of a lesser amount for work in achieving a recovery on behalf of a subset of the class, *Moore v. United States*, 63 Fed. Cl. 781 (2005).

In *Moore*, the plaintiffs' counsel brought suit against the United States for taking an easement that ran through numerous plaintiffs' property. After a valuation trial as to 13 of the plaintiffs, a settlement was reached on behalf of all but three members of the class entitling the plaintiffs' counsel to statutory fees in the amount of $1 million. The plaintiffs' counsel sought a percentage of the overall recovery obtained for all members of the class in lieu of the statutory fee to which counsel was previously entitled (and to which counsel had agreed). The court concluded that a percentage fee award from the common fund was permissible because Congress has not prohibited application of the common fund doctrine enunciated in *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980), to cases in which attorneys could recover fees under a federal fee shifting statute. *Moore*, 63 F. Cl. at 786. Further, the *Moore* court also relied on *Staton v.*

---

[6] Pursuant to Paragraph 15 of the Settlement Agreement, Class Counsel will be dismissing the appeal of each *Stillman* plaintiff who has cashed his or her check for the Distribution Amount.

Boeing Co., 327 F.3d 938 (9th Cir. 2003), in which the court stated that so long as a court has discretion to determine a reasonable fee, common fund principles do not conflict with statutory fee shifting provisions. *Moore*, 63 F. Cl. at 788.

The *Moore* court also appropriately observed that using a percentage of the fund approach was correct and consistent with the purposes of both fee shifting and common fund jurisprudence because a contrary result would put counsel in a statutory fee shifting situation in a conflict with the class in that if limited to the statutory fee, counsel would have an incentive not to agree to an early settlement, but rather would be incentivized to maximize their lodestar. *Id.* at 788 n. 13. The same principle is true here. If Class Counsel knew and was guided by the possibility that Class Counsel would be prohibited from using any *Stillman* time to support a percentage fee award from the Settlement Fund, then, perversely, their interests and the Class would have dramatically diverged and been in conflict. *See* October 22 Submission at 16-17. Plaintiffs submit that an opinion such precedent would be wrong and enforce the conflicts the common fund doctrine is designed to avoid.[7]

---

[7] Such a result would also disregard or improperly discount the manner in which the time counsel for *Stillman* expended in prosecuting the *Stillman* action significantly benefited the larger settlement class. Indeed, it cannot be disputed that the existence of the *Stillman* verdict and findings by the Court had an immeasurable effect on Staples' willingness to settle the claims asserted in the other actions that comprised the MDL and the amount of the Settlement. Specifically, the judgment for the plaintiffs in the *Stillman* action provided a strong argument in the settlement negotiations that Staples would be found to have acted with "willfulness" under the FLSA for other assistant managers' claims against it. *See, e.g.*, *Albanese v. Bergen County*, 991 F. Supp. 410 (D.N.J. 1997) (when an employer is informed that it may be violating the FLSA, it must investigate its potential violation); *see also EEOC v. Westinghouse Elec. Corp.*, 869 F.2d 696, 712 (3d Cir. 1989) (one of the strongest factors "of willfulness would be that an employer deliberately ignored judicial invalidations of plans similar to its own."). In addition, because a finding of "willfulness" is inconsistent with a finding of "good faith" under the FLSA, the *Stillman* Judgment provided a strong basis for maintaining that other assistant managers were entitled to liquidated damages against Staples during the settlement negotiations. *See, e.g.*, *Stillman v. Staples, Inc.*, 2009 U.S. Dist. LEXIS 42247 (D.N.J. May 11, 2009). Finally, the *Stillman* judgment may have provided a strong basis for finding Staples liable for FLSA violations against other assistant managers under the theory of offensive collateral estoppel.

While the *Moore* court was faced with a prior statutory fee agreement among the parties as compared to a prior judgment awarding statutory fees, there is no sound basis for reaching a different conclusion where a prior judgment is present. The *Stillman* Judgment here does not stand as some kind of judicial *res judicata* but rather, as explained above, it will be dismissed and then be deemed satisfied by the common fund fee and expense award by this Court. Accordingly, there is no need for the *Stillman* Judgment to be vacated before this Court can award a common fund fee.[8]

As for the Court's request for legal authority to "ignore" the *Stillman* Judgment, Class Counsel were unable to find any authority on the issue of whether a court may "ignore" a non-final statutory fee judgment that becomes subsumed in a larger settlement. For the reasons discussed above, this Court is not bound by the non-final *Stillman* Judgment (that will be superseded by a fee award from the Settlement Fund) or otherwise constrained in awarding a percentage fee from the Settlement Fund.

Accordingly, the existence of the *Stillman* Judgment provides no impediment to application of the common fund jurisprudence presented in Plaintiffs' October 22 Submission and it need not be vacated in order for the Court to award a percentage fee out of the $42 million Settlement Fund in lieu of that judgment.

---

[8] Class Counsel believes there is no necessity to vacate any portion (or all) of the *Stillman* judgment. However, if the Court concludes otherwise, vacatur could be accomplished by having the parties jointly request the Third Circuit to dismiss the *Stillman* fee appeal in order to facilitate a settlement pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure. Doing so would serve the interests of the parties by permitting resolution of that appeal and all of the actions that are part of this MDL which, in the circumstances present here, would outweigh any interest of the public in retaining the judgment. *See, e.g., Major League Baseball Properties, Inc. v. Pacific Trading Cards, Inc.*, 150 F.3d 149, 151 (2d Cir. 1998) (circumstances for vacating judgment found to be exceptional and not against the public interest where vacating the judgment was in the interest of both parties and was not sought by the losing party); *United Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 2001 U.S. Dist LEXIS 24565 (D. Kan. Apr. 24, 2001) (same).

CONCLUSION

For all the reasons set forth above and in the Memorandum of Law in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement, for an Award of Expenses and Attorneys' Fees, and for Approval of Incentive Awards to the Class Representatives (Docket No. 124(1)), the Supplemental Memorandum (Docket No. 130), the Declarations of Seth R. Lesser dated August 23, 2010 and October 22, 2010 (Docket Nos. 124(3) & 130(1)), and the exhibits thereto, Class Counsel request that the Court award Class Counsel fees in the amount of $11,500,000 and expenses in the amount of $327,551.99, together with such other and further relief as this Court deems just and proper.

Dated: November 2, 2010

Respectfully Submitted By:

s/ Seth Lesser__________________

Seth Lesser
Fran Rudich
Klafter Olsen & Lesser LLP
Two International Drive, Suite 350
Rye Brook, NY 10573
-and-
132 Haddon Avenue
Haddonfield, NJ 08033

Michael A. Galpern
Andrew P. Bell
Janet Walsh
LOCKS LAW FIRM, LLC
457 Haddonfield Rd. Suite 500
Cherry Hill, NJ 08002

Gary E. Mason
Nicholas A. Migliaccio
MASON LLP
1625 Massachusetts Avenue, NW
Suite 605
Washington, DC 20036

Joseph H. Meltzer
Peter A. Muhic
Robert J. Gray
BARROWAY TOPAZ KESSLER MELTZER & CHECK LLP
280 King of Prussia Road
Radnor, PA 19087

Joseph J. DePalma,
Mayra V. Tarantino
Jennifer Sarnelli,
LITE DEPALMA AND GREENBERG, LLC
Two Gateway Center, 12th Floor
Newark, NJ 07102-5003

Paul P. Rooney
Eric Scott Tilton
FUGAZY & ROONEY LLP
126 Glen Street
Glen Cove, NY 11542

Jeffrey Gottlieb, Esq.
BERGER & GOTTLIEB
150 East 18th Street, Suite PHR
New York, NY 1003

Robert E. DeRose, II
BARKAN NEFF HANDELMAN MEIZLISH LLP
360 South Grant Avenue
P.O. Box 1989
Columbus, OH 43216-1989

Lance A. Raphael
Stacy Michelle Bardo
Allison Amy Krumhorn
THE CONSUMER ADVOCACY CENTER P.C.
180 W. Washington
Suite 700
Chicago, IL 60602

Michael J. San Souci
LAW OFFICE OF MICHAEL J. SAN SOUCI
2135 Charlotte Street, Suite 1A
Bozeman, MT 59718

Timothy C. Kelly
KELLY LAW OFFICE
Box 65
Emigrant, MT 59027

ATTORNEYS FOR PLAINTIFFS AND THE CLASS